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NOTES AND COMMENTS

THE LAW SCHOOL—It is with regret that the LAW REVIEW makes this somewhat belated announcement of the resignation of Merton Leroy Ferson as Dean of the Law School of the University of North Carolina. During the two years of Mr. Ferson's deanship, there has been a fine spirit of coöperation in which the LAW REVIEW participated. Mr. Ferson brought to his work a sound scholarship and extraordinary common sense. His personality was reflected in the work of his colleagues and found expression in the work of the LAW REVIEW. His advice was constantly sought, and he was ever ready to assist. There is no doubt that Mr. Ferson will be greatly missed, and the LAW REVIEW takes this occasion to express its appreciation of the man and the Dean.

Professor Frank Smithies Rowley has also resigned from the faculty of the Law School. This announcement means a great deal to those who have learned to know him. The LAW REVIEW wishes

also to express its appreciation of his work as a teacher, as a contributor to the LAW REVIEW, and as an individual. North Carolina will miss him.

Professor McIntosh has given up his year's leave and will administer the Law School as Acting-Dean. The following year, the newly elected Dean, Abner Leon Green, will take up his work, but he will not be here during the coming school year because of his appointment to the Yale University Law School as visiting professor. Dean Leland Stanford Forrest of Drake University will be here on a one-year appointment. Professor Forrest was expected to take Professor McIntosh's work during the latter's leave of absence, but the present arrangement calls for both men to be on hand next year. Two other additions to the faculty have been made but no official announcement can be made at this time.

IMPROPER COMMENT BEFORE JURY—The recent cases of *State v. Tucker*[1] and *State v. Ballard*[2] deal with the question of unprivileged comments made by prosecuting attorneys concerning defendants. In the former case defendant was on trial for violation of the prohibition laws and had not taken the stand in his own behalf. The solicitor said in summing up the case: "Gentlemen of the jury, look at the defendants; they look like professional bootleggers; their looks are enough to convict them." On objection by defendant, the court held the remarks to be proper. The Supreme Court in an opinion delivered by Stacy, C. J., who sums up the law on the subject, overruled the lower court, holding the remarks to be prejudicial. The case of *State v. Ballard* is a good companion case to the former, for in the latter it was held that such remarks can be cured by the judge before the jury retires, either by stopping counsel, or in his charge. In this case, which was an indictment for murder, the solicitor had remarked of defendant that he had killed one of the county's best young men, and added, "He is a human hyena and should be treated as such." The error was cured by the judge then and there, on objection by defendant's counsel, stopping and rebuking counsel, who apologized.

The adjudged cases on this question show that the court has always been jealous to throw safeguards around a defendant to prohibit his case from being prejudiced by improper remarks made

[1] *State v. Tucker* (1925) 190 N. C. 708, 130 S. E. 720.
[2] *State v. Ballard* (1925) 191 N. C. (Advance Sheets) 110, 131 S. E. 370.

by opposing counsel. It is difficult to define with a great deal of particularity just what is an unprivileged comment by an attorney.[3] "Only legitimate argument may be employed. The court could not well prevent the drawing of illogical conclusions, and this is said not to be within its province. But for counsel to indulge in vituperation and abuse of the party . . . is irrelevant while it is unjust. . . . Upon the entire and varying evidence received and permitted to stand in the case, and all the probative incidents of the trial, comments may be made; and the conclusions derived therefrom, adverse to the defendant, need not be stated in soft words. Still the advocate can introduce nothing of his own special knowledge, or argue from what is not probative."[4]

In *State v. Tucker,* Stacy, C. J., said: "We would not be understood as saying anything which might have a tendency, even in the slightest degree, to suppress the highest enthusiasms of forensic effort on behalf of the state in a criminal prosecution, or in any case at the bar, but counsel should always remember that the ends of justice are best subserved by fair, open, and legitimate debate. To arrive at the exact truth, according to the law and the facts of the case, is the aim of every legal contest, and to this end the utmost power of logical reasoning may be employed."[5]

The demeanor of a defendant who has gone on the stand is a proper subject for comment.[6] The North Carolina statute enlarged the rights of defendants in criminal cases, by making them competent, at their own request, to appear as witnesses for themselves; but the statute provides that the failure to make the request shall not create any presumption against them.[7] This section changed the rules of evidence by enlarging the rights of the defendant; but it did not curtail the privileges of the prosecution; hence the solicitor is not precluded from making such comments on the evidence as would have been permissible before the passage of the act.[8]

The remarks that have been held prejudicial by the court come under four general classes:

1. Comment as to looks and appearances.
2. Comment as to character.

[3] Clark, *Criminal Procedure* (2nd Ed.), p. 534.
[4] Bishop, *New Criminal Procedure,* sec. 975a.
[5] See note 1, *supra.*
[6] *State v. Tucker, supra,* note 1.
[7] C. S., sec. 1799.
[8] *State v. Weddington* (1899) 103 N. C. 364, 9 S. E. 577.

3. Comment tending to incite popular prejudice.
4. Statement of fact not brought out in evidence.

1. Under the class of comments as to looks and appearances the facts of *State v. Tucker* are applicable. Also it has been held an abuse of privilege for a solicitor to say of defendant, who is indicted for selling liquor, and who has not gone on stand: "I do not know when I have seen a more typical blockader. Look at him, his red nose, his red face, his red hair and moustache. They are the sure signs. He has the ear-marks of a blockader."[9]

2. Under the second class, which are comments as to character, the case of *State v. Ballard* finds a place. In the case of *Coble v. Coble*,[10] the defendant had not been offered as a witness, except by the plaintiff, and one of plaintiff's witnesses had been impeached. Plaintiff's counsel said in speaking of his impeached witness: "No man who has lived in defendant's neighborhood could have anything but a bad character. Defendant pollutes everything near him, or that he touches. He is like the upas tree, shedding pestilence and corruption all around him." The decision in favor of plaintiffs was reversed on account of this error, "although the law and merits of the case are probably with the plaintiffs."

3. The cases seem to be more numerous where counsel attempt to stir up popular prejudice. Under this heading the following instances of improper remarks are cited:

Defendants were charged with forcible trespass in tearing down a shack in a lumber camp. The prosecuting attorney said: "The jury should find the defendants guilty as their fines will be paid by the Richmond Cedar Works, a foreign corporation with headquarters in Virginia, a foreign state, where its officers sit back with slippered feet and direct this thing to be done."[11]

Defendant was indicted for setting fire to a barn. He was an old negro and his counsel had spoken of his attachment for his master. Prosecutor said: "It did not appear that defendant was strongly attached to his old master and his family, as it appeared that when the test came he had a gun in his hand ready to shoot down his young master, and is now drawing a pension for it."[12] This decision did not say whether these remarks were reversible as

[9] *State v. Murdock* (1922) 183 N. C. 779, 111 S. E. 610.
[10] *Coble v. Coble* (1878) 79 N. C. 589.
[11] *State v. Davenport* (1911) 156 N. C. 596, 610, 72 S. E. 7.
[12] *State v. Tyson* (1903) 133 N. C. 692, 45 S. E. 838.

the decision was affirmed on the ground that no objection was taken at the trial. But it seems clear, from the other decisions on the question that this would have been classed as unprivileged comment, as there had been no evidence offered to sustain what the counsel said.

Prosecutor remarked of a witness, concerning whose place of birth and occupation nothing had been said on the trial: "Will you give a verdict upon the evidence of this Pennsylvania Yankee—this Rich Square grog-shop keeper?"[13]

Where counsel in a civil case refers to plaintiff as a "poor widow" and to defendant as "a wealthy corporation attempting to cheat her out of her rights," this is abuse of privilege by counsel.[14]

4. Under the fourth classification—statements of fact not brought out in evidence—may be placed the case of *State v. Tyson*.[15] Also, where prosecutor says in summing up the case to a jury, where defendant has been indicted for selling liquor, that they "could not afford to convict defendant for the reason that he had sold so much liquor that an indignation meeting had been held in front of the National Bank about the matter,"[16] this is error, as it appeared that there was no evidence to support the solicitor's remarks.

Although the remarks in the cases above cited were held to be prejudicial, the cases were reversed only in some instances. The error had been cured in the trial court in the majority of instances. This leads to the question how such error is cured. The case of *State v. Tucker* was reversed because the court, on objection by counsel, held the remarks proper. In *State v. Ballard* the effect of the unprivileged remarks was cured by the court correcting the counsel and directing the remarks stricken out, and also by referring to it in his charge.

The gist of the decisions is that where there is such error the court may correct it at its discretion, by stopping counsel then and there[17] or by suitable comment in his charge to the jury.[18] It is held that if counsel do not make the objections in apt time, they waive their rights and cannot set up the impropriety of the remarks on appeal; defendant cannot sleep on his rights at the trial and then

[13] *State v. Williams* (1871) 65 N. C. 505.
[14] *Jenkins v. Ore Co.* (1871) 65 N. C. 563.
[15] *State v. Tyson, supra,* note 12.
[16] *State v. Saleeby* (1922) 183 N. C. 740, 110 S. E. 844.
[17] *State v. Ballard, supra,* note 2; *State v. Saleeby, supra,* note 16.
[18] *State v. Murdock, supra,* note 9; *State v. Davenport, supra,* note 11.

put forward his objections on appeal when the error could have been corrected below.[19] However, two dissenting judges in *State v. Tyson* contend that such unprivileged remarks should not have to be objected to in order to be corrected; that where the abuse is gross it is the *duty* of the court to stop counsel *ex mero motu*. "As in cases of libel and slander certain words are actionable *per se*, so in trial of causes there are methods of argument which are objectionable *per se*, regardless of exception."[20]

S. E. V.

LIABILITY OF CITY FOR OBSTRUCTION OF FIRE HYDRANT—In a recent North Carolina case,[1] there was an action for damages for an alleged negligent placing of curbstones or rocks around a fire-plug or hydrant, in violation of a city ordinance, whereby the fire department of the city was unable to save the plaintiff's house from destruction by fire. The alleged obstruction was by the city's agents and employees engaged in paving the street and was permitted to remain there for six to eight months prior to the fire. The theory on which the defendant is sought to be held liable is that the negligence of the street department in placing the obstruction around the fire plug was the direct and proximate cause of the plaintiff's loss, because this negligent conduct made it impossible for the fire department to put out the fire, which, it is alleged, it could and would have done but for such negligent obstruction. A judgment of non-suit by the lower court was affirmed by the Supreme Court.

The basis of the decision was the statute which declares that "The city may own and maintain its own light and waterworks system to furnish water for fire and other purposes, and light to the city and its citizens, but shall in no case be liable for damages for a failure to furnish a sufficient supply of either water or light. . . ."[2] From the concluding words of the opinion by Stacy, C. J., it is safe to say that the same result would have been reached in the absence of statute. The quotation is as follows: "While it is sufficient to rest our present decision on the statute shielding the municipality from liability in such cases, it is not to be understood that a contrary holding would have been followed but for the existence of this

[19] *State v. Tyson, supra*, note 12. Bishop, *New Criminal Procedure*, sec. 975b.

[20] Douglas, J., dissenting in *State v. Tyson, supra*, note 12.

[1] *Mabe v. City of Winston-Salem* (1925) 190 N. C. 486, 130 S. E. 169.

[2] C. S., sec. 2807.

statute. The pertinent authorities are otherwise. However, we need not discuss a supposed or hypothetical case, or one not before us."[3]

The court refuses to agree with the plaintiff's theory of the case that the negligence of the street department was the proximate cause of the loss, but holds that the proximate cause of the loss was the failure of the fire department to put out the fire. The court concedes that it is the duty of the city, in the exercise of proper care, to keep and maintain its streets in a reasonably safe condition for public travel, but that this refers to street uses, the traffic of vehicles and pedestrians, and is not meant to include a case where the plaintiff is not using the street at all. But, granting for the sake of argument, that the negligence of the street department was the proximate cause of the plaintiff's loss, yet the court said that this was also the negligence of the city and that the statute provides that *in no case* shall the city be liable for failure to furnish a sufficient supply of water.

In any discussion of the liability of a municipal corporation for injuries resulting from the negligence of its agents in the performance of their duties, there is a well-established distinction between the performance of those functions which are governmental or public and those which are proprietary or private. The principle, as usually stated, is that a municipality is not liable in a private action for injuries resulting from the exercise of a governmental function,[4] but that it is under a common law liability for the torts of its agents while performing its proprietary functions.[5] Where the function is governmental, there is no liability unless provided by statute. That the maintenance of a fire department and the extinguishing of fires are governmental functions in connection with which, in the absence of statutory provision to the contrary, a municipality incurs no civil

[3] 190 N. C. 486, 490, 130 S. E. 169.

[4] This was first stated in *Russell v. Men of Devon* (1798) 2 Term Rep. 667, 100 Eng. Repr. 359; *accord, Howland v. Asheville* (1917) 174 N. C. 749, 94 S. E. 524, L. R. A. 1918 B 728; *Harrington v. Greenville* (1912) 159 N. C. 632, 75 S. E. 849.

[5] *Fisher v. New Bern* (1906) 140 N. C. 506, 53 S. E. 342; *White v. New Bern* (1907) 146 N. C. 447, 59 S. E. 992; *Matz v. Asheville* (1909) 150 N. C. 748, 64 S. E. 881; *Chafor v. City of Long Beach* (1917) 174 Calif. 478, 163 Pac. 670, L. R. A. 1917 E 685, where court endeavors to lay down a test for determining when a function is governmental and when proprietary; 1 Dillon, *Municipal Corporations* (5th Ed.) sec. 109.

liability, either for improper equipment or for the negligence of its employees, is generally held.[6]

The reasons or justifications advanced by the courts for adhering to the propositions of law, as above stated, are many and varied, but it is submitted that none of these reasons will stand the test of a modern analysis of the principles of the law of Torts and of Agency. Some of the principal reasons for the present rule follow:

1. It is said that the state is sovereign and the municipality is its governmental agent. Since no suit can be brought against the sovereign without his consent, therefore none can be brought against the municipality, to which the sovereign has delegated a part of its governmental function. There is no logic in holding to this relic of the days of the "divine right of kings." The immunity of a sovereign from suit rests upon no "formal conception, or absolute theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which that right depends."[7] This conception does not include a municipal corporation,[8] which is not sovereign in the same sense as is the state which creates it. It is nowhere contended that the agents and servants of a municipality can do no wrong.

2. It is claimed that a city derives no pecuniary benefit from the performance of public functions.[9] However, tort liability is not imposed because of any benefit which the tort feasor receives. A municipality recieves no pecuniary benefit from the maintenance of its streets and highways, and yet, by the great weight of authority, it is liable for injuries resulting from failure to keep the streets in suitable repair. The difficulty and confusion arises in trying to classify all occupations which benefit the city in a pecuniary way as proprietary or private functions. Many functions of a modern municipality are incapable of any such classification. There are numerous border-line cases. Consequently, the attempt at any uniform rule, based on a classification of functions as governmental or proprietary, is bound to result in difficulty and confusion.

3. Some courts hold that in the performance of public or governmental functions, the officers and employees of the city are agents

[6] 19 R. C. L. 1116 *Scales v. Winston-Salem* (1925) 189 N. C. 383, 127 S. E. 543; *Mack v. Charlotte* (1921) 181 N. C. 383, 107 S. E. 244; *Peterson v. Wilmington* (1902) 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959, 9 A. L. R. 1431, n.

[7] Mr. Justice Holmes in *Kananakoa v. Polyblank* (1907) 205 U. S. 349, 353.

[8] *R. R. Co. v. District of Columbia* (1889) 132 U. S. 69.

[9] *Hill v. Boston* (1877) 122 Mass. 344, 23 Am. Rep. 332; also *Howard v. City of Worcester* (1891) 153 Mass. 426, 27 N. E. 11, 12 L. R. A. 160.

of the state and not of the city, and consequently, the doctrine of *respondeat superior* does not apply to fix responsibility on the municipality.[10] But this assumes a situation which is contrary to the actual facts. *Respondeat superior* depends upon the degree of control which the principal or employer exercises. In the situation under discussion, the city employs, pays, dismisses and controls its servants and agents. It is the judge of their efficiency and has knowledge of their capacity. If there is to be any liability on the basis of agency or employment, the municipal corporation should be held.

4. Some courts argue that municipalities cannot properly perform their governmental functions if they are to be made liable for the torts of their employees. But the connection between the proper performance of public duties by a municipality on the one hand and its immunity from suit for the torts of its agents and servants on the other is doubtful. Liability, rather than immunity, would tend to make the management of municipal affairs more careful and more consonant with justice. Immunity directly tends to carelessness and the violation of private rights.

5. Again, it is claimed that the municipality should not be liable for negligence in the performance of duties imposed by the legislature, but only in the case of those voluntarily assumed under general statutes. It would be a novelty in our law to make voluntary assumption of statutory duty the criterion of tort liability. Such a doctrine has been challenged by convincing authority to the contrary.[11] The basis for the doctrine is found in the early common law actions. No action on the case lay by a private individual against a town for the omission to perform a public duty, but the proper procedure was by way of indictment of the town officials concerned. Naturally, for omission to perform public duties running to the community as a whole, there should be no municipal liability to private individuals. But in the cases where there has been the undertaking of an affirmative course of conduct, this anomalous doctrine, based upon a misconception of misfeasance and nonfeasance, has been grafted upon the law. The problem is a simple one of agency and of torts, and whether or not a municipality should be held to the

[10] See 4 Dillon, *Municipal Corporations* (5th Ed.) par. 1655 as to when the rule applies and for collection of cases.

[11] *Moulton v. City of Fargo* (1918) 39 N. D. 502, 167 N. W. 717; *Wilcox v. Chicago* (1883) 107 Ill. 334, 47 Am. Rep. 434; *Finelley v. City of Salem* (1884) 137 Mass. 171, 50 Am. Rep. 289; *Nixon v. Newport* (1881) 13 R. I. 454, 43 Am. Rep. 35.

prevailing principles of law in those fields. Should the municipal corporation be exempt from the rule that a principal is liable for the torts of his agents arising within the scope of authority or in the course of employment? It is submitted that municipal corporations should form no exception. Neither should the municipality be exempt from the proposition that everyone in the performance of an affirmative course of conduct must at his peril measure up to the standard of due care.

While the North Carolina court was bound to reach the result above indicated because of a statute, it would seem that, in the absence of such a statute, the courts should disregard the doubtful distinction between governmental and proprietary functions which has been so long followed and should adopt a uniform and consistent rule. Viewed from the practical standpoint of ordinary fairness, there is no valid reason why the municipality which has been guilty of an act for which a private corporation would be liable, should not be required to compensate the injured party. The risk of loss now falls on those least able to bear it. That there has been a tendency to broaden the scope of municipal liability is evidenced by recent decisions.[12] But, if the old doctrines have become too strongly intrenched in our law for a change to take place through judicial legislation, the problem will have to be given over to the legislature for satisfactory solution.

G. M. H.

[12] *Maxwell v. Miami* (1924), 87 Fla. 107, 100 So. 147; *Bertiz v. Los Angeles* (1925) 48 Calif. App. 426; *Kaufman v. Tallahassee* (1922) 84 Fla. 634, 94 So. 697, 30 A. L. R. 471; *Bowden v. Kansas City* (1904) 69 Kans. 587, 105 Am. St. Rep. 187, 66 L. R. A. 181; 34 Harv. L. Rev. 66; a most important attempt was the case of *Fowler v. Cleveland* (1919) 100 Ohio St. 158, 126, N. E. 72, since overruled by *Aldrich v. Youngstown* (1923) 106 Ohio St. 342, 140 N. E. 164.